

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

LORI L VIVONE
Claimant

APPEAL NO. 15A-UI-04603-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DAYTON FREIGHT LINES INC
Employer

OC: 03/15/15
Claimant: Respondent (2/R)

Iowa Code Section 96.5(1) – Voluntary Quit

Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 9, 2015, reference 02, decision that allowed benefits to the claimant, provided she was otherwise eligible, and that held the employer's account could be charged for benefits; based on an Agency conclusion that the claimant's March 18, 2015 voluntary quit was for good cause attributable to the employer. After due notice was issued, a hearing was held on May 26, 2015. Claimant Lori Vivone was not available at the telephone number she had provided for the hearing and did not participate. Tobin Cady represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibit One into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant's voluntary quit was for good cause attributable to the employer.

Whether the claimant was overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lori Vivone was employed by Dayton Freight Lines, Inc. as a customer service representative from June 2014 until March 18, 2015; when she voluntarily quit. Ms. Vivone's immediate supervisor was Tobin Cady, Service Center Manager. In January or February 2015, Mr. Cady met with Ms. Vivone to deliver a performance review. Mr. Cady had concluded and communicated to Ms. Vivone that her performance was poor and that she should consider looking for other employment. Mr. Cady had not communicated to Ms. Vivone that she was discharged from the employment. On March 2, 2015, Ms. Vivone submitted her resignation by email. Ms. Vivone indicated in the email that March 18, 2015. Ms. Vivone thanked the

employer for providing a positive work environment. Had Ms. Vivone not submitted her resignation, the employer continued to have work available for her; despite the employer's conclusion that Ms. Vivone's work performance had not improved after the performance review.

Ms. Vivone established a claim for benefits that was effective March 15, 2015. Her weekly benefit amount was set at \$334. For the week ending March 21, 2015, Ms. Vivone reported wages and received \$94 in reduced benefits. For the weeks ending March 28, April 4, and April 11, 2015, Ms. Vivone reported zero wages and received \$334 in benefits. Ms. Vivone received benefits totaling \$1096.

On April 8, 2015, a Workforce Development claims deputy held a fact-finding interview to address the claimant's separation from the employment. The fact-finding materials, as they were scanned into the Agency's computer server, are incomplete. Missing from the fact-finding materials are the Claims Deputy's notes regarding what the claimant said at the time of the fact-finding interview and pages five through seven of the employer's seven-page fax.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

The weight of the evidence in the record establishes a voluntary quit that was without good cause attributable to the employer. The voluntary quit followed a poor performance review a month or two prior to the effective date of the quit. Despite the employer's concerns about Ms. Vivone's performance, and the employer's suggestion that Ms. Vivone begin a search for new employment, the employer had not discharged Ms. Vivone from the employment and continued to have work available to her at the time she separated from the employment. The administrative law judge notes that Ms. Vivone completed a two-week notice period as part of her resignation, which would be inconsistent with a discharge from the employment. Because Ms. Vivone voluntarily quit the employment without good cause attributable to the employer, she is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account will not be charged for any benefits paid to Ms. Vivone for the period beginning on or after the entry date of this decision.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the

employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

Because this decision disqualifies Ms. Vivone for the benefits she has received in connection with the claim, those benefits constitute an overpayment of benefits. Ms. Vivone is overpaid \$1096 for the four-week period of March 15, 2015 through April 11, 2015. Because a portion of the fact-finding record appears to be missing from the administrative file materials scanned onto the Agency's server, and because the Benefits Bureau, may have a more complete record of the fact-finding interview, the question of whether the employer participated in the fact-finding interview and the question of whether the claimant or the employer will be liable for the benefits already paid is remanded to the Benefits Bureau for adjudication.

DECISION:

The April 9, 2015, reference 02, decision is reversed. The claimant voluntarily quit the employment on March 18, 2015; without good cause attributable to the employer. The claimant is disqualified for benefits until she has worked in a been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits to be paid to the claimant for the period on or after the entry date of this decision. The claimant is overpaid \$1096 for the four-week period of March 15, 2015 through April 11, 2015.

This matter is remanded to the Benefits Bureau for adjudication of the issues of whether the employer participated in the fact-finding interview within the meaning of the law, whether the employer's account may be assessed for benefits already paid to the claimant, and whether the claimant must repay the overpaid benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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